

No. 2760

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HALVORSEN TRANSPORTATION COMPANY (a corporation), J. B. ARKISON, H. C. HALVORSEN, GEORGE W. DORNIN, C. R. CODDING, G. C. CODDING, P. S. COLBY, and A. M. DEVALL, and a certain barge and the gasoline launch "SEVEN BELLS", her engines and machinery and appurtenances,

Appellants,

VS.

V. J. B. CHEDA,

Appellee.

BRIEF ON BEHALF OF CLAIMANTS OF LAUNCH "SEVEN BELLS".

LOUIS T. HENGSTLER,

I. F. CHAPMAN,

GOLDEN W. BELL,

*Proctors for Claimants of Launch
"Seven Bells"*

Filed this.....day of May, 1916.

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FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk.

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I. Introduction.

It is to be noted that two distinct interests are severally appealing from the decree of the District Court.

One of these appellants is comprised of the Halvorsen Transportation Company, a corpora-

tion, which was libeled in personam, and which appeared and claimed the so-called "Certain Barge" which was libeled, and the divers individuals mentioned in the libel as stockholders in said corporation.

The other of these appellants is comprised of the claimants of the launch "Seven Bells". This is the interest on behalf of which this brief is submitted.

The Halvorsen Transportation Company, the barge and the individual stockholders were libeled as common carriers of certain merchandise which said company agreed to transport from San Francisco to San Rafael, and which was not all there delivered. The launch "Seven Bells" was employed by the Halvorsen Transportation Company to tow the "certain barge" upon which the merchandise was laden.

Therefore, as is more fully pointed out hereinafter, the question of the liability of the launch "Seven Bells" is entirely different from and independent of the question of the liability of the barge and its owners. The latter relates to the liability of a common carrier, *whereas the former relates to a towage liability*. This distinction is most important, particularly in its bearing upon the placing of the burden of proof.

After the filing of the libel against the "Seven Bells", and after she had been properly brought before the court, which was prior to August 24,

1914, as she was rapidly deteriorating, all parties, shortly before April 1, 1915, stipulated that she might be sold and the proceeds deposited in court. Accordingly, on April 14, 1915, the launch was sold for \$685, which sum was deposited by the marshal with the clerk.

No relief is sought by the claimants of the "Seven Bells" against the Halvorsen Transportation Company's interests, nor by those interests against the "Seven Bells".

In considering the following statement of the case, we respectfully request the court to keep before it the chart showing the relative locations of the points mentioned, and the course pursued by the "Seven Bells" and her tow.

II. Statement of the Case.

On December 30, 1913, the Halvorsen Transportation barge was loaded with the cargo herein involved (Ap. 44), a portion of which consisted of perishable goods, meat, groceries, etc. (Ap. 44). Libelant knew that this cargo was to be loaded on this barge, and that the barge was to be towed from San Francisco to San Rafael by the "Seven Bells" (Ap. 83, 84), as had been done for some five or six months (Ap. 94, 95). He knew, also, the peculiar aspects of the navigation involved, which required crossing the San Francisco Bay and the negotiation of the very shallow San Rafael Creek,

which could be entered only at high tide with a boat of light draft (Ap. 74-87). His contract of carriage was with the Halvorsen Transportation Company, *and not with the "Seven Bells"*. Between the "Seven Bells" and the Halvorsen Transportation Company there was only a contract of towage (Ap. 74, 75, 86, 87, 91, 92, 93).

The barge having been loaded, on the evening of December 30, 1913, at about seven o'clock P. M., the "Seven Bells" started from the San Francisco seawall for San Rafael with the barge in tow (Ap. 44, 45, 95, 117). She went almost to Alcatraz Island, and then, on account of the storm and the difficulty of entering San Rafael Creek in the darkness, put back to the seawall (Ap. 45, 96, 117, 136, 140). The wind, during this procedure, according to the records of the United States Weather Bureau, introduced by libelant, was from the southwest and was blowing at a velocity of: 7 to 8 o'clock, 42 miles per hour; 8 to 9 o'clock, 37 miles per hour; 9 to 10 o'clock, 38 miles per hour; 10 to 11 o'clock, 40 miles per hour (Ap. 140). As the "Seven Bells" was able to tow the barge back in the face of this wind (Ap. 45, 96, 117), there can be no question but that the "Seven Bells" was sufficient in power for the towage in question. She was a vessel of 50 horse-power, in dimensions 45 feet long, 15 feet wide, and 4½ feet deep. The barge was 68 feet by 28 feet, and drew from 12 to 16 inches (Ap. 95).

Having put back to the seawall, her crew were up during the night to observe the weather, realizing that they were obliged to get the perishable cargo to its destination without delay, and realizing, at the same time, that they must exercise due care as to when to start and how to get it there (Ap. 96, 118).

In the early morning of December 31, 1913, the storm appeared to have blown itself out (Ap. 55, 56, 62, 96, 97, 98, 105, 106, 117, 118, 137, 139, 162, 163, 164, 170, 181, 182, 191, 192), and in the exercise of their judgment from all indications, the "Seven Bells" started with her tow. That they exercised proper judgment and acted as reasonable, experienced navigators in starting at this time, cannot be doubted. Libelant's witness Silva said "it looked good that morning" (Ap. 62). Libelant's witness Peterson (who recollected nothing as to the particular day involved in this case, and testified only generally), said that he would have had no hesitancy in sending out such a combination from San Francisco when the wind was from 20 to 25 knots in San Francisco (Ap. 70). The United States Weather Bureau records, introduced by libelant, showed that the wind from one o'clock A. M., December 31, 1913, to the time of the start, blew a *total distance per hour as follows* (Ap. 136, 137, 138, 139, 140):

1	o'clock	A. M.	to	2	o'clock	A. M.	—28	miles
2	"	"	"	3	"	"	30	"
3	"	"	"	4	"	"	21	"

4 o'clock A. M.	to 5 o'clock A. M.	—21 miles
5 " " "	6 " "	19 "
6 " " "	7 " "	18 "
7 " " "	8 " "	22 "
8 " " "	9 " "	21 "

It is to be carefully noted that these figures of the Weather Bureau *do not represent the velocity of the wind at any one time during a given hour but simply the total distance the wind blew during that hour* (Ap. 137, 138, 139), as the *actual* velocity is not recorded unless it exceeds *36 miles per hour* (Ap. 136), as it did during the evening of *December 30th*, as above pointed out. As the Beaufort Scale, used by the Weather Bureau, classifies wind rates as follows:

0 to 3 miles per hour	—Calm
3 to 8 " " "	Light Air
8 to 13 " " "	Light Breeze
13 to 18 " " "	Gentle Breeze
18 to 23 " " "	Moderate Breeze,

it will be seen that Mr. Peterson, in saying a start in a wind from *20 to 25 knots* was proper, was correct. Furthermore, both of the Gilmores and libellant's witness Silva (Ap. 56) testified that the wind was proper for the start, as was also the general outlook; Mr. Crowley, who went out later on the same day, did likewise (Ap. 164), as did Mr. Doe (Ap. 192), and Mr. McLaughlin (Ap. 181), both of whom started out on the same morning, December 31st, as did the "Seven Bells", at about the same time, and in boats of about the same power

as the "Seven Bells". And these men were disinterested witnesses. That the "Seven Bells" was adequately powered for her undertaking, and that it was proper for her to start when she did, on December 31st, cannot, we submit, be doubted.

The combination proceeded without trouble to a point beyond California City Point (Ap. 53, 109), and between that point and San Quentin Point (Ap. 98, 119, 53, 57), when *suddenly* the wind came up and a squall of *unusual violence and duration* arose (Ap. 56, 57, 119, 120, 163, 165, 172, 182, 183, 184, 192, 193, 196). It was the judgment of the "Seven Bells" that it was better to proceed, under the circumstances, than to attempt a return to San Francisco in the face of this sudden and violent squall (Ap. 120 and G. M. and A. H. Gilmore). It was a situation requiring the exercise of reasonable judgment—not absolutely infallible judgment—and the "Seven Bells" met it with all requisites. That it was not only reasonable, but wholly sound, in fact, in its judgment not to turn back, is conclusively proved by the fact that McLaughlin's boat, "John A. Brittain", a vessel of the same character, size and horse-power as the "Seven Bells", towing a barge *smaller* than the Halvorsen barge, while bound for a brick yard on the southerly side of McNear's Point, towing on a *5½-inch line*, with the wind, and two or three miles further off shore than the "Seven Bells", broke his *5½-inch tow line* at *two different times*, and had a man washed off of his launch by the sea (Ap. 182 et seq.). This is

proof absolute of the wisdom of the "Seven Bells" in not turning back or trying to get into deeper water. And it is corroborated forcefully by Mr. Doe, who was crossing on the same morning to Sausalito, with a launch in all respects like the "Seven Bells", with some cargo upon her. The squall shifted his cargo, flooded his engine room with water, and temporarily disabled his engine (Ap. 192).

No witness of libelant testified that the "Seven Bells" could or should have taken any course under the circumstances other than she did in fact take. No witness of libelant testified that, from the position off California City Point, the "Seven Bells" should have directly tried to get around McNear's Point. On the contrary, the "Seven Bells" witnesses said this could and should not have been done (Ap. 102, 184, 185). And that they were correct is proved by the fact that McLaughlin in the "John A. Brittain", *which was two or three miles further off shore than the "Seven Bells" when the squall struck them, tried this course, and barely escaped by a margin of sixty or seventy feet from being blown upon the rocky McNear's Point* (Ap. 187). Had he been where the "Seven Bells" was, he testified that he could not, by any possibility, have negotiated McNear's Point (Ap. 187).

The "Seven Bells", then, from the position between California City Point and San Quentin Point made for the mouth of San Rafael Creek (Ap. 57, 48, 99, 100, 101). She passed San Quen-

tin Point safely (Ap. 99). *No witness of libellant testified that this course was improper*, and the witnesses for libellant, three of them being disinterested, on the bay on the day in question, and familiar with the San Rafael run, testified that it was not improper (Ap. 71; 99 to 104; 119 to 121; 130 to 132; 173, 174, 176, 177, 185, 187, 194). Doe said, in the situation of the "Seven Bells" he *might* have tried to turn back, but said the course of the "Seven Bells" was, under the circumstances, proper, though he might have adopted the other (Ap. 193, 194, 196). That the "Seven Bells" procedure was the better advised appears indisputably from what happened to the "John A. Brittain" and her barge, which were in a more favorable position when the storm broke than was the "Seven Bells" (Ap. 182, 183, 184, 188). McLaughlin said he might have dropped anchor and tried to hold the barge off, had he been in the "Seven Bells" situation; but he admitted that he did not think he could have succeeded in such attempt (Ap. 185, 186). There was not only no such negligence in proceeding as the "Seven Bells" did, as would make her liable; there was no negligence at all, and, on the contrary, the skillful execution of a judgment sound in fact.

When the "Seven Bells" arrived at the mouth of San Rafael Creek she tried to shorten line and get in (Ap. 100, 120); but she could not shorten line to any appreciable extent, as the condition of the sea was such as to make it hazardous to

do so, and, even if accomplished, to either break the shortened line, or tear the bits to which it was fastened out of the launch (Ap. 100, 120). Nor could the barge be taken into the Creek on the long line; *for though the launch herself could have entered, the wind and sea would then have thrown the barge on the rocks which run far out on the northerly side of the narrow and shallow channel leading to the Creek* (Ap. 99, 100, 120, 128, 129, 177, 178, 186).

Therefore the "Seven Bells", *disregarding her own safety*, deliberately turned away from this offered safety to herself alone, in a determination to save her tow at all hazards. She tried to get behind the small rocks known as the Marin Islands in the hope of protection from the wind (Ap. 101, 102, 121). But, owing to the force of the wind (Ap. 100, 101, 121, 122, 124) and the flood tide (Ap. 59), and the extreme shallowness of the water in that vicinity (Ap. 47, 59, 98, 103, 121, 166, 171, 174, 187, 195 and chart) her propeller being out of water a great deal of the time (Ap. 121, 124, 132), and her stern continually striking bottom, making steerage almost impossible (Ap. 103), and greatly detracting from her engine power (Ap. 103, 121, 122, 123, 124), she could not make this shelter (Ap. 101, 102, 121). She then did her best to make it around McNear's Point (Ap. 102, 103, 110, 121, 122), but the wind, tide and shallow water made it impossible, as was almost the case with the "John A. Brittain" (Ap. 182, 183, 184).

Seeing that this could not be done, the "Seven Bells", still pounding continually on the bottom, and her propeller out of water a great deal of the time, placed the barge in a position off a mud flat and let her go in order to beach her on the mud, as a last resort (Ap. 103, 104, 105, 107, 111, 122). Instead, in spite of the "Seven Bells'" best calculations, she went on the rocky point at the easterly end of the mud (Ap. 61, 62, 102, 103, 104, 105, 112, 122, 123, 179). Had the "Seven Bells" not dropped the barge, both vessels would have gone ashore, to no purpose (Ap. 106). The anchor, which was let go by Silva, the Halvorsen barge-man, of his own accord, tended to throw the barge on the rocks instead of letting her go on the mud, where she would have been safe (Ap. 105, 110).

The "Seven Bells" then waited until the barge beached (Ap. 122), went to San Rafael with all speed (Ap. 116, 112, 122), her crew returned to McNear's Point with all dispatch and did what could be done with the cargo, on that day and the next (Ap. 51, 112). They notified the Halvorsen Company of San Rafael of the accident, and Mr. O'Brien of that company went to the scene (Ap. 51, 145, 146).

No more could have been done than the "Seven Bells" did for the safety of this barge. Mr. McLaughlin's smaller barge went ashore on the *northerly and protected* side of McNear's Point, in spite of a heavy anchor and the break formed by the Point. That the Halvorsen barge went

ashore on the *southerly and exposed* side of that Point, then, is not at all to be wondered at. The remarkable thing is that the “Seven Bells” managed her so ably from the beginning, and kept her safe so long.

As to the unusual violence of the storm and the extreme suddenness with which it arose when the “Seven Bells” was between California City Point and San Quentin, there is no question. Libelant’s witness Peterson did not remember anything as to that particular day, and his witness Silva said it was an unusual storm and very sudden “no fooling” (Ap. 55, 56). Doe, McLaughlin, Crowley (all disinterested witnesses) said it was an unusual storm—the hardest they had ever seen on the Bay, and very sudden. It broke McLaughlin’s *5½-inch tow line twice* and washed a man off his launch. It shifted Doe’s cargo, filled his engine room and stopped his engine. It broke the two anchor lines of the schooner which Crowley later rescued, and threw her on the beach. Its violence and suddenness, we submit, is proved without conflict. True, the weather records offered by libelant (Ap. 137) show that *in San Francisco* the *total distance which the wind blew* during each of the hours in question was as follows:

10 A. M. to 11 A. M.—	26 miles
11 “ “ 12 Noon—	25 “
12 “ “ 1 P. M.—	33 “
1 P. M. “ 2 P. M.—	34 “

But the Court will bear in mind that these figures do not represent the *velocity* of the wind at a given time. At 1 P. M., *for instance, the weather man testified that the wind blew at a velocity of forty miles in San Francisco.* So, assuming the velocity on the San Rafael side to have been the same as at San Francisco, the weather man's testimony is in full accord with that of the witnesses as to this storm. And particularly is this so when it is recollected that the wind on the San Rafael side may be much stronger than on the San Francisco side. The effect of the sudden wind on the boats of Doe, McLaughlin, the Gilmores and the schooner Crowley rescued, speaks louder and more convincingly than any testimony, even were there contrary testimony in the record—which is not the fact.

The "Seven Bells" did not telephone from San Francisco to San Rafael on the morning of the 31st to ascertain how the weather was there (Ap. 125). Nor did anyone from San Rafael telephone to San Francisco before the "Seven Bells" started, instructing her not to start (Ap. 35, 108, 125, 145). The libelant testified that Mr. O'Brien, the Halvorsen Company's agent at San Rafael, told libelant that he had telephoned to the "*captain of the barge*" (Ap. 81) not of the "Seven Bells", before she had left San Francisco, advising him not to come as the weather there was too rough (Ap. 81). Of course the testimony as to this conversation was not binding on the "Seven Bells", as it was pure hearsay, duly objected to.

It is to be noted that the captain referred to was not the master of the "Seven Bells", but *of the barge*. Mr. Coddling himself testified that he telephoned to San Rafael from San Francisco on the morning of the 31st to see if the barge had arrived (Ap. 35, 36).

Mr. O'Brien, the San Rafael agent of the Halvorsen Company, testified that prior to this occasion the Halvorsen Transportation Company had repeatedly desired Gilmore, of the "Seven Bells" to "get a smaller boat", i. e., barge (Ap. 142, 143), as the company thought that *their own barge* was too large for the "Seven Bells" (Ap. 143). Mr. Coddling's testimony is to the opposite effect, and he said:

"We would have preferred to have a stronger tugboat at times of very severe winds, *but it was very difficult and impossible to get any boat to do better than that, because the draft there, or the channel, is very shallow, and you could not use the 'Golden Eagle' in San Rafael Creek. That was the best boat we could use. We concluded right along we had the best tow available for that purpose*" (Ap. 158, 68, 106).

Mr. Gilmore said that he told Mr. O'Brien that the barge was too large for handling in "those narrow creeks" and at Jackson Street; but not on the Bay (Ap. 198).

Mr. O'Brien also testified that Gilmore, the master of the "Seven Bells", was not "an experienced man at the business" (Ap. 148). He did not report

his opinion to the Halvorsen Company, because he says

“They knew it; they were going to make a change; they were figuring on some one to take his place, but they were never able to get anyone to take his place” (Ap. 154, 155).

Mr. O’Brien was not qualified as an expert on towage in any way (Ap. 148 et seq.). There is evidence of a personal animus on his part against Gilmore, and Mr. Coddington himself said as to Gilmore’s competency:

“I do not recollect that question came up at all. I am satisfied—I never questioned his competency as a navigator, or heard it questioned” (Ap. 158).

There is not a syllable of evidence to show that Gilmore was not fully competent. McLaughlin says that he was competent (Ap. 189, 190) and his handling of the “Seven Bells” in the storm proves it. He had had years of experience on the water (Ap. 126, 127).

The Halvorsen Company had a launch of its own, the “Golden Eagle”, of greater horse-power and deeper draft than the “Seven Bells” (Ap. 39, 152, 153, 158). She could not be used in San Rafael Creek because her draft was too deep (Ap. 158, 65, 59).

The testimony, *without contradiction*, shows that the “Seven Bells” was a good boat (Silva, Ap. 55); that she was sufficiently strong to handle the Halvorsen barge (except under extraordinary condi-

tions) (Peterson, Ap. 68, 70; G. M. Gilmore, Ap. 94, 106, 132; G. C. Coddington, Ap. 157, 158; Crowley, Ap. 164, 165, 166, 169, 172, 175; A. H. Gilmore, Ap. 198); that she was peculiarly fitted for the service in which she was engaged, to wit, towing over a body of deep water and then into a very shallow creek (Ap. 158, 166, 167, 169, 190, 191).

With the facts before us, we now proceed to apply the law to them.

III. The Law Applicable to the Facts.

A. THE "SEVEN BELLS" NOT UNDER COMMON CARRIER'S OBLIGATION. BURDEN UPON LIBELANT TO PROVE NEGLIGENCE ON PART OF "SEVEN BELLS" NOT SUSTAINED.

It is clear that the "Seven Bells" was not under a common carrier's obligation as to libellant's cargo. This principle is well established:

"The contract for the transportation of the ear wheels was between the libellant and the barge only. The tugs are in no way responsible to the libellant for the performance of that contract. Their liability is under their contract of towage only, as to which the libellant is bound by the terms agreed on by the barge. As it was known, when the cargo was shipped, that the barge would be towed to her place of destination, the shipper, in the absence of anything to the contrary, is presumed to have left the time and the manner of the towage to the discretion of those in charge of her navigation.

There can be no recovery in this action except for negligent or unskillful towing. The tugs did not, by their contract, insure the safe delivery of the cargo at the end of their route.

Their agreement was to tow the barge, and, in so doing, to use such care and skill as a prudent man would exercise, under like circumstances, in the management of his own business. The law implies that their care and attention were to be in proportion to the dangers encountered and the consequences of neglect. This is but common prudence. The greater the risk, the greater should be the effort to avoid it. The burden of showing negligence is on the libellant. The mere fact of sinking the cargo is not enough. Actual fault, contributing to the loss, must be proven."

The W. E. Gladwish, 29 Fed. Cas. 17,355, at p. 587;

The Hardy, 229 Fed. 985 (C. C. A., 9th Circuit, 1915).

Therefore the burden was undoubtedly upon libellant to prove negligence upon the part of the "Seven Bells". As to the Halvorsen Transportation Company, whether or not the burden was upon it as a common carrier is not our concern in this brief. It is sufficient for our purposes that the "Seven Bells" *was not* under a common carrier's obligation. There might consistently be a holding that the Halvorsen Transportation Company failed to sustain the burden of proof upon it as a common carrier, and that the libellant failed to sustain his burden with reference to the "Seven Bells".

1. The Judge of the District Court Misconceived the Law.

It is apparent from the remarks of the learned judge of the court below that he tried the case upon the theory that the obligation of the "Seven Bells"

with reference to the cargo of the barge was that of an insurer, which was clearly erroneous:

“The COURT. Q. If his judgment fails, who loses?

A. Well it has always been customary that if you don't deliver the goods it is up to you.

Q. That is, when you are carrying the goods on your own boat?

A. From what I understand, and have understood for years, when you put a tow line on a barge, no matter who it is, it means it is up to you, it is your judgment to know whether to put that line on there or not. That is the way I have always taken it.

The COURT. *That sounds pretty reasonable to me too. You don't think the shipper ought to be responsible for your lack of judgment do you?*

A. No I don't think so.

The COURT. *Nor do I.*”

(Ap. p. 71; see also, Ap. p. 196.)

2. Departure of “Seven Bells” Proper.

We shall not again review the facts and circumstances surrounding the departure of the “Seven Bells” from San Francisco, as they have been fully stated above. It will be sufficient here to call to the attention of the court several cases in which the care to be exercised by the tow-boat as to when and under what circumstances to start on a voyage is defined.

“But a low though rising barometer, and the display of cautionary signals, are not alone, in my judgment, so certain indications of bad weather that trips of a few hours' duration only must be condemned, where all the ordinary signs visible to experienced and practical sea-

men indicate safe weather for the trip. No experts were called to testify that the starting out was improper under the circumstances. If such short trips were condemned by law, as lacking ordinary prudence, on account of the mere possibility of danger suggested by the barometer and cautionary signals, in the absence of any other unfavorable indications, much of the towing business of this harbor must often come to a standstill for a considerable period, except at the risk of the tugs as insurers. Clearly, that is not the practice; nor is it the fair import of the contract of the parties in taking such boats to tow. Practices, or so-called customs, that are at variance with the obligations that the rules of law impose, are indeed void, and afford no defense. The Wm. Murtaugh, 3 Fed. Rep. 404. *But there is no rule of law, and I am not prepared to hold, that short towing trips must be condemned so long as the barometer is low, though rising, and cautionary signals are displayed, in the absence of all other indications of probable bad weather.*

The requirements of law are substantially the same, both as to the adequacy of the tug for the work assigned her, and as to proper weather for starting out: and it is the same that is applied to seaworthiness in general, viz: reasonable sufficiency for the particular trip or voyage, according to the judgment of persons versed in the business. The defense of unseaworthiness is not made out by showing that 'a stouter ship might have survived the peril'. *Amies v. Stevens*, 1 Strange, 128. The law does not require a vessel, to be seaworthy, to be capable of withstanding every peril; nor that a tug be capable of rescuing her tow in all weather; nor that she shall start only when there is no possibility of danger; nor that the master in an emergency shall infallibly do

that which, after the event, others may think would have been best. The Hornet, 17 How. 100; The Star of Hope, 9 Wall. 230; The W. E. Gladwish, 17 Blatchf. 77, 83; The Mohawk, 7 Ben. 139. The tug must be reasonably adequate for the work undertaken; managed with reasonable judgment and nautical skill; and she must start only in weather that in the judgment of nautical men is reasonably safe for the trip. In whatever form the question comes up, whether as to seaworthiness, adequacy for the work, or the time of starting, it is a practical question of reasonable prudence and judgment. And as regards seaworthiness in general, or the adequacy of the tug for the work undertaken, there is no other final criterion than the judgment of practical men versed in the business and the customs and usages of the time and place, viewed as representing the judgment and knowledge of the time. To show this, the custom and practice of nautical men is admissible. See The Titania, 19 Fed. Rep. 101, 105-109, and cases there cited. The exercise of reasonable prudence and judgment, measured by this standard, does not exclude some remaining maritime risks. Against these risks it is the province of insurers to provide; otherwise, the shipper is his own insurer."

Judge Brown in *The Allie & Evie*, 24 Fed. 745, at 748, 749.

Judge Brown, in *The Frederick E. Ives*, 25 Fed. 447, at 449-50:

"Whatever might seem to be the natural probability, I cannot hold that the majority of witnesses are certainly in error in saying that the wind at Norfolk was about N. at 8 P. M., particularly as Worden's testimony would only make the wind from N. to N.N.E. at bed-time. Nor do I feel prepared to hold, in the ab-

*sence of explicit evidence, that even if the wind was N.N.E. at 8 P.M., it was ipso facto negligence for the Ives to undertake to continue her trip four hours longer to the much better harbor of Bridgeport. Such a wind is doubtless unfavorable; but the approach of north-easterly storms is usually so gradual that I do not feel warranted in holding the mere continuance of a trip for so short a space of time to be negligence, unless there were other decided indications of speedy bad weather. I think the weight of testimony of the nautical men in this case is altogether against the existence of such clear or certain indications of bad weather at that time.” * * **

“The object of insurance is to cover the proper perils of the sea; but not, as respects the carrier, any neglect of ordinary judgment and nautical skill on his part. The carrier is bound to the exercise of reasonable judgment and skill; and if the loss happen through the want of either, the carrier must indemnify the insurer. In determining what constitutes reasonable care and skill, all the circumstances of the time and place, the capacity of the tug, the nature of the tow, and the length of the trip must be taken into account. *Nor can any exact criterion be found that does not necessarily still leave much to be determined by the judgment of the master formed upon the spot and amid all the surroundings as they appeared at the time.* On this subject, Chief Justice Waite says, in the case of *The W. E. Gladwish*, 17 Blatchf. 77, 83, 84:

“This involved the exercise of judgment as to what ought to be done under the circumstances. *A mere mistake is not enough to charge the tugs with any loss which followed. To make them liable, the error must be one which a careful and prudent navigator, surrounded by like circumstances, would not have made.*

* * * I cannot believe that ordinary prudence required an abandonment of the voyage, for the time being, by lying up or seeking a harbor. The tug was commanded by a competent master, and the captain of the barge was an experienced boatman. *No objection was made by anyone to going on, and it is evident that no person connected with the tow considered it necessary to stop.*' See, also, *The Clematis*, Brown, Adm. 499, 502; *The Allie & Evie*, 24 Fed. Rep. 745, 749, and cases there cited.

In this connection, the judgment of other captains and nautical men is competent, and entitled to much weight. Their judgment ought, indeed, to be controlling, if it were certain to be formed and expressed with impartiality. Making all just allowances for their presumptive bias in favor of the Ives, I cannot refuse considerable weight to the fact that the testimony of all the captains and pilots that were in the vicinity of Norwalk that night is that from sundown to 8 P.M., and even later, there were no indications of bad weather as should prevent the Ives from going on. The fact, moreover, that none of the men upon the 'boxes', some of whom had their families aboard, made any objection to going on, is negative evidence to the same effect, of at least some weight. The captain of the Ives, moreover, had had considerable experience on the Sound, and had never met with any previous accident. He had no motive, so far as appears, for running any improper risks. There is no reason to doubt that his judgment was formed honestly and in good faith; and where the evidence fails to show clearly and decisively such signs of threatening weather, as according to the fair and reasonable judgment of persons of proved character and nautical skill, ought to forbid going on, the vessel should have the

benefit of any reasonable doubt in the testimony."

(Ibid, 450-51.)

It is a very important circumstance, in the case at bar, that the voyage upon which all parties knew the barge with her cargo were to be taken by this particular launch, and this particular master, was short and necessitated crossing deep water first, and then negotiating an exceedingly shallow creek. This was the same situation presented in the *Allie & Evie*, supra, and Judge Brown pointed out, in his usual sound manner, the importance of its bearing upon determining whether or not the tow-boat was negligent.

In order not to add unduly to the length of this brief, we refer the court to the thorough discussion of the principles governing what constitutes proper care upon the part of a tow-boat in starting on a voyage, in

The Wilhelm, 47 Fed. 89, at 91 et seq.

The same principles which were very recently stated by this court, with reference to another phase of a towage, are equally applicable here:

The Hardy, 229 Fed. 985.

The testimony in the case at bar is not, in any particular, in conflict as to the propriety of the departure of the "Seven Bells" from San Francisco, at the particular time when she did depart. *On the contrary all of the witnesses, on both sides, agreed that the conditions were then proper for her*

to depart. The court should not substitute its own views for those of the nautical witnesses, nor should hypercritical scrutiny after the event be substituted for the judgment of the master of the tow-boat, exercised under the particular circumstances, as the legal test of fault.

The Wilhelm, supra;

The Czarina, 112 Fed. 541 (De Haven, J.);

The Covington, 128 Fed. 788;

The Hercules, 73 Fed. 255;

The Packer, 28 Fed. 156;

The Charles Allen, 23 Fed. 407.

“Even if the master made an error of judgment in not returning sooner, this is not the same thing as negligence, and negligence does not seem to me to be established by the testimony. The Allie & Evie, supra.”

The E. Luckenback, 109 Fed. 487, 489.

The “Seven Bells” was under no obligation to telephone to San Rafael as to the weather there.

The Allie & Evie, supra, at 748.

San Rafael is far inland, and the weather there, in any event, would be no criterion of conditions on the bay.

3. Navigation of “Seven Bells” Proper.

It would serve no good purpose to repeat here the facts as to the voyage of the launch and her tow, as they are fully stated above in chronological order, so far as possible. The test as to whether the navigation was proper, and conformed to the require-

ments of the law is fully stated in the authorities already cited and quoted.

No witness, on either side, said that the navigation and handling of the "Seven Bells" and her tow were improper. There is no conflict of testimony on the subject. All of the evidence establishes that the navigation and handling of the vessels was wholly skillful and proper in view of all of the circumstances. The judgment of the court should not be substituted for the judgment of the nautical men before it.

4. Casting Off of Barge Proper.

This proposition is a corollary of those set forth above. Whether or not the barge should have been cast off under the circumstances, was a question for the judgment of those on the launch under the circumstances. There is nothing in the testimony to show that she should not have been cast off. The evidence shows, without conflict, that it was the proper thing to cast her off. In view of the extraordinary storm, *which was clearly a peril of the sea*, such was the only course which could have been pursued.

The Charles Allen, 23 Fed. 407.

5. "Seven Bells" Adequate In All Respects.

The facts show that the "Seven Bells" was an ideal boat for the towage in question. She was adequately powered, and her draft peculiarly fitted her for the navigation of the deep waters of the bay and the very shallow waters of San Rafael Creek. A boat of deeper draft could not navigate

in the creek, though she could navigate in the bay. It was necessary to have a boat which could do both. Such a boat was the "Seven Bells". The above authorities show that a tow-boat is not under obligation to be able to navigate under all circumstances. There must be some province left for insurers.

"A vessel which undertakes a towing service is not an insurer of the safety of the tow. *It meets the full measure of its obligation if it is reasonably adequate to the towing service.*
* * *"

The Hardy, supra, at 986.

The opinion of the District Court expressly says that while the "Seven Bells"

"was able to handle the barge in deep water, or on the flats in fair weather, she was not sufficient to handle the barge on the flats in rough weather".

(Ap. 199.)

In other words, she was able to handle the barge *in all weather in deep water, and on the flats in fair weather*. No boat could have handled the barge on the flats in the weather encountered by the "Seven Bells". The experience of the "John A. Britton" shows that the storm which suddenly arose on the day in question was much out of the ordinary, and not such as was to be expected. The very nature of the voyage of the "Seven Bells", across deep water and then over shallow flats into a narrow and shallow creek involved the possibility of danger, as libellant well knew. Surely, if the "Seven Bells" was adequate in all weather in

deep water, and in good weather on the flats, she was "reasonably adequate to the towing service" (*The Hardy*, supra). *No vessel would or could have been more adequate on the flats under the circumstances.*

The testimony of the witnesses of both sides was unanimously to the effect that the "Seven Bells" was adequate for the towing service. There is no suggestion of a conflict in this respect. It cannot be doubted, we submit, that the "Seven Bells" met all requirements as to seaworthiness, power, draft and all physical qualities. Here, again, the court's opinion should not be substituted for that of the nautical experts before it.

Furthermore, libelant knew that this particular launch had towed this particular barge for several months, and would tow it on this occasion. He should have insured himself against such a loss as that which happened; for it was not due to any fault of the launch or her crew. The launch never guaranteed safe towage of the barge; she was employed, without any misrepresentation or concealment on her part, to tow this particular barge, and she did so. She did not warrant her power and ability against the elements.

It is respectfully submitted that not only has libelant not sustained the burden of proof upon him, as to the "Seven Bells", but she has affirmatively shown herself free of all fault and negli-

gence, *without any conflict of testimony upon any point.*

Inasmuch as the "Seven Bells" was sold for \$685, which was deposited in the court below, the decree of the District Court should not only be reversed, but it should be ordered that, if any of that fund has been applied to expenses of this suit, libelant should be required to make it whole, so that the claimants of the "Seven Bells" receive the sum of \$685 intact, just as they would receive the vessel itself had it not been sold.

Dated, San Francisco,

May 15, 1916.

Respectfully submitted,

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"Seven Bells".*